Appendix

Additional Details on the CWR

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Jurisdictional; did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Jurisdiction included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Jurisdiction included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

“Waters of the United States” and the Clean Water Rule

February 9, 2017

Overview of Presentation

- **Waters of the US in context**
  - CWA programs
  - Section 404 program
  - Longstanding regulations
  - Legal challenges
- **The Clean Water Rule**
  - Scientific basis
  - Rulemaking process
  - Content of CWR
  - Litigation

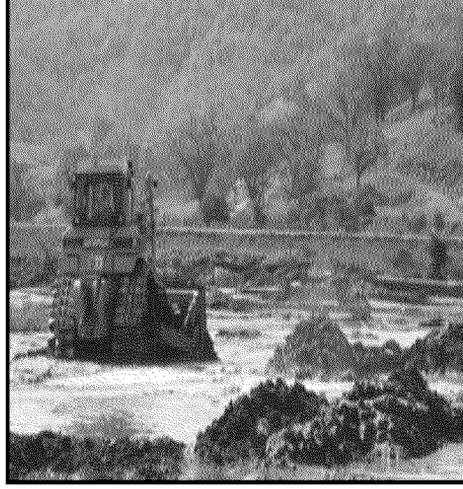
“Waters of the US” and the Clean Water Act

- “Waters of the US” (WUS) is a threshold term under the Clean Water Act (CWA) for the scope of the Act
- All CWA programs address “navigable waters,” defined in the statute as “waters of the United States including the territorial seas”
  - CWA did not define WUS; Congress left further clarification to agencies
- EPA and the Army Corps have defined WUS by regulation since the 1970s. The regulatory definition in place before the CWR dates to the mid 1980s
- Two U.S. Supreme Court decisions since that 1980s regulatory definition did not invalidate the definition, but shaped its implementation across all CWA programs

"Waters of the US" and the Clean Water Act, continued

- CWA establishes many programs to protect quality of WUS:
  - Section 303(c): state-developed water quality standards setting waters' quality goals
  - Section 303(d): "Total Maximum Daily Load" (TMDL) plans to bring waters into compliance with water quality standards
  - Section 311: oil spill prevention and clean-up
  - Section 401: state/tribal certification that federal permits and licenses are consistent with CWA and local requirements
  - Section 402: "NPDES" permit program for "end of pipe" discharges of liquid wastes from sources such as factories, sewage treatment plants
  - Section 404: permit program for discharges of dredged/fill material

WUS and Section 404



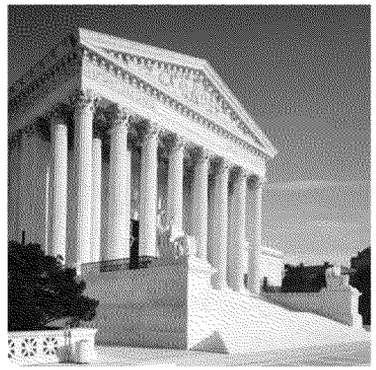
- Same definition of WUS applies to section 404 as other CWA programs
- Since 1972 the Army Corps and EPA have jointly implemented the program to significantly reduce the ongoing loss of wetlands and streams, while authorizing tens of thousands of dredged/fill activities annually
  - Congress tasked the Army Corps with operating the 404 permit program and EPA with developing the environmental review criteria under which permits would be evaluated
  - EPA and the Army Corps have jointly developed the definition of WUS, while EPA has the final policy responsibility for its scope

WUS and Section 404, continued

- The Army Corps makes the vast majority of jurisdictional determinations (JDs)
  - This is in part why WUS issues so often arise in the section 404 context
  - However, court decisions about the scope of WUS also have involved the section 402 NPDES and section 311 oil spill clean-up programs
- Even if dredge/fill discharges are into a WUS, a 404 permit might not be required if activity is excluded under 404(f)
  - For example, discharges associated with ongoing farming activities such as plowing, seeding, and cultivation typically do not need a 404 permit

WUS and its Longstanding Regulatory Definition (dates to mid-1980s)

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Many, but not all, waters are considered to be WUS**:
  - Waters used/historically used/susceptible to use in interstate commerce
  - Interstate waters and wetlands
  - All other waters … the use, degradation, or destruction of which could affect interstate commerce
  - Impoundments of WUS
  - Tributaries of above waters
  - Territorial seas
  - Wetlands adjacent to above waters
  - Excludes: prior converted cropland, waste treatment systems



WUS at the Supreme Court

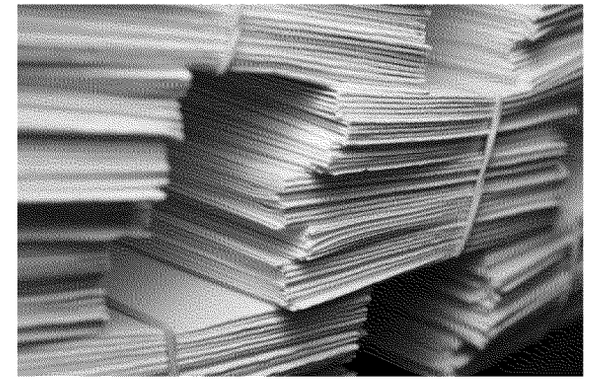
- ***Riverside Bayview*** (1985): Adjacent wetlands to TNWs are properly part of WUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make "other waters" WUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WUS includes
  - Scalia: "Relatively permanent" or at least seasonal waters; wetlands with a "continuous surface connection"
  - Kennedy: Waters with a "significant nexus" affecting physical, chemical, or biological integrity of downstream waters
  - All: WUS includes more than just waters that are navigable

WUS and Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinions
  - These cases arise in more than 2/3 of all U.S. states
  - U.S. position: water is jurisdictional if meets either the Kennedy or Scalia standards

- U.S. Circuit Courts of Appeal are split regarding what standard applies
  - Most hold either Kennedy or Scalia standard can be used
  - One held Kennedy standard only
  - None say Scalia standard only

- Supreme Court has rejected all petitions for review



Why Did the Agencies Develop the Clean Water Rule (CWR)?

- The Supreme Court did not invalidate the 1980s definition of WUS, but discussed its limitations and implications
- Many were confused how to implement the unchanged definition in light of the Supreme Court decisions. When was a permit required? Will a case-by-case determination cause delays?
- For more than a decade, EPA and the Army Corps received requests for rulemaking to provide clarity
  - Bipartisan Members of Congress, Supreme Court Justices, state and local officials, industry, agriculture, environmental and conservation groups, scientists, builders and developers, and the public

Why Did the Agencies Develop the CWR? Continued

- The agencies wished to clarify the scope of federal protection for streams and wetlands that form the foundation of our nation's water resources.
  - **People depend on clean water for their health:** About 117 million Americans get at least some of their drinking water from streams that lacked clear protections after *Rapanos*
  - **Our economy depends on clean water:** manufacturing, farming, tourism, recreation, energy production and other major economic sectors need clean water to function and flourish
  - **Recreation and wildlife depend on clean water:** healthy ecosystems provide wildlife habitat and places to fish, hunt, paddle, and swim

CWR: Scientific Support

- The agencies' interpretation of the CWA's scope in the rule is guided by the **best available peer-reviewed science** – particularly as that science informs the determinations as to which waters have a "significant nexus" with traditional navigable waters (TNWs), interstate waters, or the territorial seas
  - Includes the Science Report summarizing **more than 1,200** peer-reviewed, published scientific studies which showed that small streams and wetlands cumulatively play an important role in the health of larger downstream waterways like rivers and lakes
- The **Technical Support Document** utilizes the Science Report and the articles it cites, as well as additional scientific literature to provide the scientific support for the rule
- The **Science Advisory Board** commented on both the Science Report and the proposed rule, concluding that much of the proposed rule was supported by available science and that the agencies could have protected yet more waters

Scientific Support - SAB Conclusions on Proposed CWR

- SAB states that science **supports the conclusion** that the types of water bodies identified as "waters of the United States" in the proposed rule exert strong influence on the chemical, physical, and biological integrity of downstream waters

- Though SAB was supportive of much of the proposed rule, some of their comments **suggested that the proposal could go further** in terms of waters that could be considered tributaries and went too far regarding exclusions
  - Advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks
  - Exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification
  - There is a lack of scientific knowledge to determine whether ditches should be categorically excluded

CWR: Process

- Agencies held two in-person meetings with **small entity** representatives to discuss their thoughts on how to define WUS. Their input is reflected in the CWR and summarized in a report
- Agencies consulted with **state, tribal, and local officials** throughout the process. The CWR reflects their input, which also is summarized in a report
- For example, held in-person meetings and teleconferences with organizations of elected state/tribal/local officials, following up with numerous additional calls and meetings
- Held a series of meetings with the Local Government Advisory Committee

CWR: Process, continued

- Proposed rule subject to public comment May 2014
  - Received 1.1 million comments, about 20,000 unique, in a 207-day comment period
  - Over 400 stakeholder meetings
  - Interagency review
- Final rule published June 2015, effective August 2015
  - Final ORD science synthesis provided much of the technical basis for the rule
- Sixth Circuit stayed the CWR nationwide pending outcome of litigation in October 2015
  - Agencies using the mid-1980s definition during the stay

CWR: Content

- Bright line: Waters that are WUS
  - Unchanged from 1980s rule: Traditional navigable waters, territorial seas, interstate waters, impoundments of WUS
  - Tributaries, adjacent waters: in 1980s rule but with further definitions
    - Tributary: For first time, CWR defines "tributary" as a water with "bed and banks" and an "ordinary high water mark" that contributes flow to a traditional navigable water, interstate water, or territorial sea
    - Adjacent: Existing regulations define "adjacent" as "bordering, contiguous, or neighboring." CWR defines and limits "neighboring" for the first time using floodplain and distance concepts. CWR applies adjacency to all waters, not just wetlands, thereby clarifying status of ponds and lakes adjacent to jurisdictional water.
    - Agriculture: CWR adds for the first time that the agencies will not consider waters "adjacent" that are being used for normal farming, ranching, or forestry activities
- Case-by-Case
  - Waters within certain distances, on a floodplain, or similarly situated, need a significant nexus to be jurisdictional

CWR: Content, continued

- **Bright line: waters that are <u>not WUS</u>**
  - Retains existing exclusions for prior converted cropland, waste treatment systems
  - Adds new exclusions reflecting public input, such as stormwater management and water recycling systems built in uplands
  - Exclusions for certain ditches, newly added to the regulations
    - Ditches not constructed in streams and that flow only when it rains
    - Ditches not constructed in streams and that have intermittent flow, that do not drain wetlands
    - Ditches not connected to the tributary system
  - Adds new exclusions reflecting longstanding practice, newly added to the regulations, such as irrigated areas that would revert to dry land if irrigation ceased, and farm ponds and other artificial lakes or ponds

Additional information on CWR in Appendix

CWR: No New Permit Requirements for Agriculture, while Preserving Existing Permit Exemptions

Normal farming, silviculture, and ranching practice.

Upland soil & water conservation practice.

Agricultural stormwater discharges

Return flows from irrigated agriculture

Construction/maintenance of farm or stock ponds or irrigation ditches on dry lan.

Maintenance of drainage ditches

Construction or maintenance of farm, forest, and temporary mining road.